APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED APRIL 20, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-60964-CIV-ZLOCH

BRIAN KILCULLEN,

Plaintiff,

vs.

GUY LEWIS, TERRENCE THOMPSON, LAURIE RUCOBA, HOWARD WEINTRAUB, MICHAEL CONSAVAGE, JOHN DEVANEY, MICHAEL PALMER, EG&G TECHNICAL SERVICES, INC., formerly EG&G Dynatrend, Inc., EG&G, INC., GEORGE MELTON, JERRY HAWKINS, JOHN DENT, ROY BUTLER, SR., ROY BUTLER, JR., and PATRICK HOMES,

Defendants.

ORDER

THIS MATTER is before the Court upon Plaintiff, Brian Kilcullen's Motion For Rule 60(B) Relief From Judgement And Monetary Sanctions (DE 98). The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.

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In the instant Motion (DE 98), Plaintiff, Brian Kilcullen (hereinafter "Plaintiff") seeks relief from a prior Order (DE 93) of the Court which dismissed his claim in the entirety. That prior Order (DE 93) was also the subject of Plaintiff Notice of Appeal (DE 94) to the United States Circuit Court of Appeals for the Eleventh Circuit. On February 5, 2004, the Eleventh Circuit issued a Mandate (DE 97) affirming the prior Order (DE 93) of this Court.

The Court notes that it may grant relief from judgement for the reasons set forth in Fed. R. Civ. P. 60(b). Rule 60(b) provides in relevant part that:

> The court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, or discharged, or a prior judgment upon which

> it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment have prospective application; or
>
> (6) any other reason justifying relief from the operation of judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). The Court finds, however, that Plaintiff has failed to set forth a reason in his aforementioned Motion which would justify relief from the Court's Final Order of Dismissal (DE 93) under Fed. R. Civ. P. 60(b). Moreover, though designated as a motion for relief pursuant to Rule 60(b), for all intents and purposes the instant Motion (DE 98) seeks review of the Eleventh Circuit's Mandate (DE 97) affirming the prior Order of this Court. This Court, however, is bound by the Eleventh Circuit's Mandate. *See A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 253 F.3d 576, 582 (11th Cir. 2001) (citations omitted).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Plaintiff, Brian Kilcullen's Motion For Rule 60(B) Relief From Judgement And Monetary Sanctions (DE 98) be and the same is hereby **DENIED**.

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DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 20th day of April, 2004.

s/ William J. Zloch
WILLIAM J. ZLOCH
Chief United States District Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED MAY 12, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-60964-CIV-ZLOCH

BRIAN KILCULLEN,

Plaintiff,

vs.

GUY LEWIS, TERRENCE THOMPSON, LAURIE RUCOBA, HOWARD WEINTRAUB, MICHAEL CONSAVAGE, JOHN DEVANEY, MICHAEL PALMER, EG&G TECHNICAL SERVICES, INC., formerly EG&G Dynatrend, Inc., EG&G, INC., GEORGE MELTON, JERRY HAWKINS, JOHN DENT, ROY BUTLER, SR., ROY BUTLER, JR., and PATRICK HOMES,

Defendants.

ORDER

THIS MATTER is before the Court upon Plaintiff, Brian Kilcullen's Motion For Reconsideration And/Or Recusal (DE 104). The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.

In the instant Motion (DE 104), Plaintiff, Brian Kilcullen (hereinafter "Plaintiff") seeks relief from a prior Order

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(DE 103) of the Court which denied Plaintiff's Motion for Rule 60(B) Relief (DE 98) from the prior Order (DE 93) of the Court which dismissed his claim in its entirety. That prior Order (DE 93) was also the subject of Plaintiff Notice of Appeal (DE 94) to the United States Circuit Court of Appeals for the Eleventh Circuit. On February 5, 2004, the Eleventh Circuit issued a mandate (DE 97) affirming the prior Order (DE 93) of this Court dismissing the above-styled cause.

I. Rule 60(b) Relief

A district court is justified in reconsidering a prior order pursuant to Federal Rule of Civil Procedure 60 (b) when (1) there is an intervening change of law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. *Lamar Adver. of Mobile, Inc. v. City of Lakeland, Florida*, 189 F.R.D. 480, 489 (M.D. Fla. 1999). A motion to reconsider must demonstrate why the court should reconsider its prior decision and " set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Socialist Workers Party v. Leahy*, 957 F. Supp. 1262, 1263 (S.D. Fla. 1997) (*quoting Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 295 (M.D. Fla. 1993)). Such a motion "is not a vehicle for rehashing arguments already rejected by the court or for refuting the court's prior decision." *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 686 (M.D. Fla. 1996).

In the instant Motion (DE 104), except in so far as it seeks recusal, Plaintiff merely rehashes the arguments contained in his previous Motion (DE 98). Accordingly, Rule 60(b) relief is unavailable.

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II. Recusal

The instant Motion also seeks to have the undersigned recuse himself pursuant to 28 U.S.C. § 455(a). Section 455(a) provides that

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a) (2003). As has been repeatedly stated by the Eleventh Circuit in applying § 455(a),

> The test for determining whether a judge's impartiality might reasonably be questioned is an objective one, and requires asking whether a disinterested observer fully informed of the facts would entertain a significant doubt as to the judge's impartiality.

Bivens Gardens Office v. Barnett Banks of Florida, 140 F.3d 898, 912 (11th Cir. 1998) (*citing Diversified Numismatics, Inc. v. City of Orlando*, 919 F.2d 382, 385 (11th Cir. 1991) and *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988)); *see also Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000) (*citing United States v. Kelly*, 888 F.2d 732, 744-45 (11th Cir. 1989)). The intent underlying § 455(a) is "to promote public confidence in the integrity of the judicial process" and "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Services Corp.*, 486 U.S. 847,

860, 865 (1988); *see also Parker*, 855 F.2d at 1523 (*quoting Liljeberg*, 486 U.S. at 860, 865)). Moreover, in light of the intent of the statute, disqualification should be granted where a judge would harbor any doubt concerning whether disqualification is appropriate. *Parker*, 855 F.2d at 1524 (*citing United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987)). Thus, disqualification under § 455 (a) is possible where no actual partiality, bias or prejudice for or against a party exists.

The United States Supreme Court has held, however, that "judicial rulings alone almost never constitute a valid basis for a bias of partiality motion." *Likeky v. United States*, 510 U.S. 540, 555 (1994) (*citing United States v. Grinnell*, 384 U.S. 563, 583 (1966)) . Similarly,

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Id. Taken together, this is the so-called "extrajudicial source" doctrine. *See id.* at 554; *Christo*, 223 F.3d at 1334.

The instant Motion (DE 104) states as its basis for recusal "these Orders, which ignore these detailed frauds and deceits, clearly evidences a prejudice in favor of the defendants over that of the Plaintiff." Plaintiff also complains that "[t]his Court has chastised the Plaintiff, for going outside the lines,

not pleading properly and not exercising his Rights within the Statutes, but then overlooks the frauds and deceits perpetrated before it, which make clear the need for this equitable pursuit of justice, necessitated by said frauds and deceits." Plaintiff fails, however, to demonstrate an extrajudicial expression of bias or any "deep-seated favoritism or antagonism" to satisfy the § 455 standard. Plaintiff merely bemoans the Court's prior rulings directing him to comply with the Federal Rules of Civil Procedure and holdings denying him claim on the merits. The Court's prior rulings may serve as the basis for appeal,[1] but do not constitute a basis for recusal. *See Likeky*, 510 U.S. at 555 (*citing Grinnell*, 384 U.S. at 583)

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Plaintiff, Brian Kilcullen's Motion For Rule 60(B) Relief From Judgement And Monetary Sanctions (DE 98) be and the same is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of May, 2004.

s/ William J. Zloch
WILLIAM J. ZLOCH
Chief United States District Judge

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1. Again, the Court notes that Plaintiff appealed the prior Order (DE 93) of the Court dismissing the above-styled action and that the Eleventh Circuit issued a Mandate (DE 97) rejecting Plaintiff's appeal and affirming the holding of the Court.